Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5331

LLOYD J. SCHUMACKER, *et al.*
Petitioners

v.

PEIRCE JUNIOR COLLEGE,
Respondent

Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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Dated: October 7, 1975

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IN THE

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No.

LLOYD J. SCHUMACKER, *et al*

Petitioners

v.

PEIRCE JUNIOR COLLEGE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioners, appellants below, respectfully pray that a writ of certiorari issue to review the decision of the Commonwealth Court of Pennsylvania (No. 1214, Commonwealth Docket, 1974) entered herein on March 11, 1975 (unreported).

OPINIONS BELOW

On April 10, 1975, Petitioners filed a petition for allowance of appeal, from the Commonwealth Court decision, with the Supreme Court of Pennsylvania. On July 9, 1975, the Supreme Court denied the petition *per curiam* (No. 1881 Allocatur Docket, unreported). The Commonwealth Court opinion is reprinted in the Appendix, *infra*, pp. 24-29. The Commonwealth Court af firmed the denial by the Court of Common Pleas of

Chester County, Pennsylvania, of a petition brought by Petitioners herein to intervene in an appeal instituted by Respondent and presently pending in the Court of Common Pleas. The opinion and order of the Court of Common Pleas (No. 157, February Term, 1974, unreported) was entered on August 9, 1974, and it is reprinted in the Appendix, *infra*, pp. 20-23.

JURISDICTION

The opinion of the Commonwealth Court of Pennsylvania was entered on March 11, 1975. On April 10, 1975, Petitioners filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. On July 9, 1975, the Supreme Court of Pennsylvania denied this petition. The opinion of the Commonwealth Court is reprinted in the Appendix, *infra*, pp. 24-29, and a notice of the ruling of the Supreme Court of Pennsylvania is reprinted *infra*, p. 30. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the denial to landowners of the right to intervene in an appeal of a zoning order concerning the use of land adjacent to or in the immediate vicinity of their homes, is a denial of the right to a hearing in violation of the Due Process Clause of the Fourteenth Amendment, where property interests of the landowners are clearly threatened and the issues the landowners seek to argue can only be raised, if they are to be raised at all, in the forum entertaining the appeal, and where the local government (township) is arguing as appellee.

U.S. CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment

The relevant portion of Pa. R.C.P. 2329 (42 Pa. C.S.A. 2329, as amended 1975) is as follows:

> "Action of Court on Petition
>
> . . . an application for intervention may be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the interest of the petitioner is already adequately represented; . . ."

STATEMENT OF CASE

In April, 1969, Respondent, Peirce Junior College ("Peirce") purchased seventy-five acres of ground in Easttown Township, Chester County, Pennsylvania. Petitioners Matthew J. and Carole A. Broderick, Esqs., and W. H. Sterg and Frances H. O'Dell own properties in the immediate vicinity. Petitioner Lloyd J. Schumacker, Esq., lives immediately adjacent to the Peirce property. The area is zoned for the least dense residential use, and educational use of property is permitted as a conditional use only.

On February 4, 1972, Peirce filed an application with Easttown Township for a conditional use permit for a college educational use of its land. Hearings were held before the Board of Supervisors on May 18 and June 2, 1972, at which the Petitioners appeared in person and by attorney. At the second hearing, the Board declined to accept any new testimony. On January 21, 1974, the Board of Supervisors again met, and, after denying Petitioners' specific request for allowance to present additional testimony, the Board granted the conditional use permit subject to certain conditions.

On February 19, 1974, Pierce appealed the imposition of certain of the use conditions to the Court of Common Pleas of Chester County. Easttown Township is opposing Peirce on the appeal. Basically, Peirce objects to the Board's limiting its educational use to a junior college level, with no more than 100 students, all of whom must be fulltime, and with activities limited to daytime classes only. In addition, Respondent seeks to remove the further conditions that parking-lot lighting be limited to 8:00 P.M., and that Respondent be obligated to make fixed improvements in the public road on which its driveway entrance will be located. The Board of Supervisors in its January, 1974, ruling, and the Township in its brief before the Court of Common Pleas, argue that these conditions are justified on two grounds. First, in applying

for an educational use, Peirce was clearly limiting its request to a permit for a junior college only, with no more than 100 full-time, daytime students, and with building facilities for classes only and not for laboratories, dining balls, or dormitories. In addition, Peirce itself suggested that it might make improvements in the road to which it would have access. Secondly, the conditions imposed were "not unreasonable . . . when considering that this is an educational use in the center of a residential district." Parking-lot lights lit past 8 o'clock, and more than two hundred round trips a day on the area roads—the Peirce land being inaccessible by public transportation—would be too burdensome on those living in the immediate vicinity. The condition imposed on Peirce to make permanent improvements in the road on which its driveway entrance would be located, was necessary in view of the narrowness of the road, and the presence of two dangerous curves.

Seeking to protect the quiet, uncrowded nature of the area, Petitioners petitioned the Court of Common Pleas for leave to intervene, and the Township consented to the intervention. In their petition, Petitioners stated that if they were allowed to intervene, they would argue a number of points, two of which were that the Court did not have jurisdiction of the case, the proper forum for Peirce's appeal under the Pennsylvania Rules of Civil Procedure being the Zoning Hearing Board of Easttown Township, and that, if the Court decided to entertain the appeal, the conditions imposed by the Supervisors should be sustained, or, if they could not be sustained on the record, the case should be remanded to the Board of Supervisors, since any inadequacy of the record to support the conditions imposed would be due to a denial to Petitioners of a full opportunity to submit relevant testimony. On August 9, 1974, the Court of Common Pleas denied the petition on two grounds. First, the Court held that under the Municipalities Planning Code, the Petitioners clearly had a right of appeal to the Zoning Hear-

ing Board, and it was before that body that Petitioners' legal interests could and should have been enforced. Secondly, under Pa. R.C.P. 2329, Pa. C.S.A. 2329 (1975), the Court found it could deny this petition on two theories. First, the issues petitioners would raise if they were granted leave to intervene, would relegate the appeal to a secondary and subordinate matter. Secondly, the Petitioners' interests were adequately represented by the Township.

Petitioners appealed the denial of their petition to the Commonwealth Court. In their brief they argued that the holding of the Court of Common Pleas that all their interests could and therefore should be enforced in an appeal to the Zoning Hearing Board, was simply incorrect. When Peirce appealed a ruling of the Board of Supervisors to the Court of Common Pleas and not to the Zoning Hearing Board, Petitioners could not contest the jurisdiction of the Common Pleas Court or endeavor to defend the conditions imposed by the Supervisors on Peirce's use, in a proceeding before the Zoning Hearing Board. Similarly, Petitioners argued that the holding of the court below that all the issues Petitioners wished to raise would relegate the appeal to a subordinate matter, was incorrect. When the Township itself was raising the question of jurisdiction and arguing the validity of the conditions imposed on the use, surely Petitioners arguing these same points could not render the appeal a secondary matter. Finally, Petitioners argued that their interests would not be adequately represented by the Township as the Township does not have the same personal interest in the outcome of the case, and as the Township would certainly not raise the issue of Petitioners being denied the right to present the full amount of relevant testimony they wished to offer. In their brief Petitioners noted that to deny them the opportunity to intervene in this case would be to deny them "the right to protect their legally enforceable interests in the proceeding through which they (would) be directly affected." On March 11, 1975,

the Commonwealth Court affirmed the order to the Court of Common Pleas on the ground that the issue of jurisdiction was not in subordination to nor in recognition of the propriety of the appeal, and that Petitioners in their desire to argue the validity of the conditions would be adequately represented by the Township. Petitioners then petitioned for allowance of appeal to the Supreme Court of Pennsylvania, alleging that if the lower courts were to be upheld, they would be "deprived of due process and their right to speak concerning their interest in the development of property" adjacent and in the near vicinity. The Supreme Court denied the petition *per curiam*.

REASONS FOR GRANTING THE WRIT

Introduction

This case does not present a question of Fourteenth Amendment substantive due process. Petitioners do not seek consideration by this Court of the constitutionality of a state's exercise of its police power in the form of township zoning regulations. Rather this petition alleges denial by the state courts of procedural due process to Petitioners in their efforts to protect property interests which have been recognized and sanctioned by the state in a ruling by a township board of supervisors. The issue which Petitioners respectfully urge this Court to consider is a novel, unclear, and important one involving the extent of procedural due process guarantees. In addition, because a hearing here is being afforded to Easttown Township, which the Pennsylvania state courts held adequately represents the interests of Petitioners, and because it is only at this hearing that Petitioners can raise the points they wish to assert, resolution of this issue necessarily entails consideration of a second novel and important, albeit corollary, issue—the extent to which the right of intervention is consitutionally compelled.

I. The Extent of Protection Afforded Petitioners' Interests by Fourteenth Amendment Procedural Due Process Is Unclear.

While there have been a great number of decisions handed down by this Court recently concerning the definition of "property interests" which fall within the realm of procedural due process protection, these cases have been concerned primarily with public benefits. See e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1969) (welfare); *Board of Regents v. Roth*, 408 U.S. 564 (1971); *Slochower v. Board of Education*, 350 U.S. 551, *reh. denied*, 351 U.S. 944 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (public employment); *Bell v. Burson*, 402 U.S. 535 (1971) (motor vehicle registration and driver's license). Counsel for Petitioners has been able to find no decision of this Court dealing with the extent of procedural due process protection of property interests where "property" is viewed in the more usual, basic sense of real property. Moreover, in this research, Counsel for Petitioners was unable to find *one* federal case discussing procedural due process requirements in the realm of zoning. There is thus little guidance for finding an answer to the question to what extent Petitioners' property right asserted here—basically the right to enjoy their own private property free from disturbance from others—is afforded protection by procedural due process guarantees.

However, there is some guidance, and that would indicate that Petitioners should not be deprived of the interest they assert here, without an opportunity for a full hearing.

In *Board of Regents v. Roth* (at 570-571) Mr. Justice Stewart, writing for the Majority, stated: "(T)o determine whether (procedural) due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." It would be difficult to argue that an interest like Petitioners', in preserving the integrity of their own *real property*, falls outside the meaning of

"property" as used in the Due Process Clause. In 1829, in the case of *Wilkinson v. Leland*, 2 Pet. 627, 657, Mr. Justice Story implied that the "right of the citizens to the free enjoyment of their property lawfully acquired" is a basic tenet underlying the "great and fundamental principle of a republican government." More recently, this Court has held the right to enjoy one's private property to be a fundamental right encompassed by the Due Process Clause, where questions of substantive due process were involved. *Sterling v. Constantin*, 287 U.S. 378 (1932) (the right of a lessee oil company to extract oil from the leased premises); *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) (the right of a trust company, which owned and maintained a philanthropic home to replace the old structure with a new one); *Buchanan v. Warley*, 245 U.S. 60 (1917) (the right of a white owner to sell his house to a black buyer). While the interest of Petitioners in preserving, as much as possible, the quiet, uncrowded nature of their neighborhood may seem of less significance than the interests asserted in these three cases, it is, as noted above, the *nature* of the interest that matters, not its *weight*, when determining whether procedural due process applies. Moreover, as this Court held in *Fuentes v. Shevin*, 407 U.S. 67, 89 (1971), the "basic due process requirement" is not limited to the protection of only those property interests which can be characterized as "necessities".

The "weight" of Petitioners' interest here *is* important however, once it has been ascertained that procedural due process applies, in determining what kind of a hearing procedural due process demands. *Board of Regents v. Roth*, at 570. The interests they assert here are of great importance to Petitioners. Not only would the removal of the conditions from Respondent's use, which Respondent seeks, have a possibly marked effect on the monetary value of Petitioners' properties (especially that of Mr. Schumacker), but it would also produce unpleasant changes in Petitioners' everyday lives. The increased noise and crowding of the area roads which would result would certainly alter

the quiet nature of the residential neighborhood. Moreover, these interests have received some recognition as being important by the State of Pennsylvania, acting through the Township Board of Supervisors. This recognition is reflected in the Board's imposition of certain of the conditions Peirce seeks to have removed.

While normally, the nature and extent of the hearing required by procedural due process is determined by balancing the interests Petitioners seek to protect against any interest the state may have in providing minimal safeguards, *Roth* at 570, that test does not quite apply here. For in this case the state is already providing a full hearing—in the Court of Common Pleas for Chester County. Here, where the points Petitioners wish to assert can only be raised before the Common Pleas Court in this "hearing", and Petitioners' interests are already, to an extent at least, represented by a party to the hearing—*i.e.* the Township of Easttown—the question is not what type of hearing should be afforded, but to whom should a full hearing be made available. A question of procedural due process has thus become one of intervention. The balancing process to be performed here would seem to be a weighing of the importance of Petitioners' interest versus the extent to which these interests are adequately represented by the Township and the extent to which the intervention of Petitioners into the trial would cause undue delay and confusion.

II. The Extent To Which Intervention Is Constitutionally Compelled Is Unclear.

The resolution of this balancing problem is not at all facilitated by federal decisions dealing with the constitutional underpinnings of the right of intervention. In his research, Counsel for Petitioners was able to find no such cases. The only federal statement on the question of intervention is F.R.C.P. 24, 28 U.S.C., which, according to the Advisory Committee at the time of the rule's adoption,

merely "amplifie(d) and restate(d) the present federal practice at law and in equity." *Missouri-Kansas Pipe-Line Co. v. U.S.*, 312 U.S. 502, 508, *reh. denied*, 312 U.S. 665 (1941). However, while it is not clear that Rule 24 is a statement of constitutional principles, it is fairly clear that Petitioners would have the right to intervene *as a matter of right* in this case under 24(a)(2). 24(a)(2) has three requirements: 1) that petitioner claim "an interest relating to the property or transaction which is the subject of the action"; 2) that petitioner "be so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest;" and 3) that the petitioner's interest not be "adequately represented" by a party to the action. The first two requirements are definitely satisfied in this case. *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 777 (1944). The third requirement would also seem to be satisfied on the ground that while it will be in the interest of the Township to assert Petitioners' interests in the quiet enjoyment of their properties, the Township's "interest in presenting this defense is merely strategic; it does not have the same vital stake" as the Petitioners do, in seeing that their interests are protected. *Commercial Union Insurance Co. v. City of St. Louis*, 497 F.2d 957, 958 (8th Cir. 1974).

The only way to resolve the balancing issue in this case, in the absence of commentary by the federal judiciary on the constitutional dimensions of intervention, is simply to confront the factors directly and weigh them. Certainly the intervention of Petitioners before the Court of Common Pleas cannot lead to much confusion or to excessive delay, for Petitioners will mainly emphasize certain of the grounds justifying the Board of Supervisors' ruling, and they will, in addition, be asserting a defense which the Township raises in its brief—that the Court lacks jurisdiction. On the other hand, as shown above, the interests Petitioners seek to protect by intervention, while not necessities, are of great significance to Petitioners in their everyday lives. As to the adequacy of representation

of the Petitioners' interests by the Township, it should be noted that not only does the Township not have the same personal stake as Petitioners in the use Peirce will make of its property, but, in addition, the Township's defense of the Board's ruling is premised to a large extent not on considerations of impact on Petitioners' properties, but on the limited nature of Peirce's application for an educational use. Further, it should be noted that the Township certainly will not raise the issue of the Petitioners being denied a full hearing before the Board of Supervisors and the point that thus, if the record before the Board is found to be inadequate, there should be a new hearing before the Board and not merely a reversal of the conditions of the zoning order. In light of this, and of the further fact that Petitioners can only meaningfully assert the points they wish to raise before the Court of Common Pleas in the pending appeal, clearly the weighing of the three factors above results in a balance in their favor.

CONCLUSION

Because this petition seeks consideration of important and novel questions, Petitioners respectfully urge that the writ issue.

Respectfully submitted,

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APPENDIX

STATEMENT

On December 19, 1973, the Commonwealth Court of Pennsylvania directed that the Supervisors of Easttown Township approve or disapprove the application for a conditional use filed by Peirce Junior College. The opinion referred specifically to Section 1207 of the Zoning Ordinance of Easttown Township as it existed at the time of the application. When last this matter was before the Supervisors, we issued a statement, dated June 5, 1972, reflecting the conclusions reached by us following the public hearing held before the Supervisors on May 18, 1972.

As a preliminary matter, and with the advice of counsel, the Supervisors have determined that the direction from the Commonwealth Court requires a decision on the record as it existed on June 5, 1972. We are not, therefore, in a position to reopen the record for either further evidence or argument. We have been notified by at least certain interested parties that they would wish the opportunity to present further evidence at this time. In order to afford such parties an opportunity to protect the record, they may submit to the Secretary of the Township at the conclusion of this meeting a written offer of proof, which will then be attached to the minutes of this meeting in order to reflect the testimony and other evidence that would have been offered but for the decision not to reopen the record.

We propose now to consider the application and act upon it with the express understanding that the application is limited to what was referred to in the earlier hearings as Phase I of the plans of Peirce Junior College. We note that it was stated by counsel for Peirce at the hearing on May 18, 1972, that Peirce "would not practically be able to continue only with Phase I only with approximately 100 students. It's just not economically feasible." We are advised that the law of the Commonwealth of Pennsylvania on matters of this kind does not permit us to weigh the question of economic viability in making a determination as to a conditional use. Equally, we note, the fact that a particular use

may not be economically viable does not constitute an argument later for a more extended use. In other words, nothing that we do at this time with reference to this application can, in our judgment, be construed as an argument for or an indication of a particular disposition of any future application for a more extended use of the premises in question, if any such application is made.

The issue before us is not free from doubt. The problem arises from the fact that we are dealing with terms that are not absolutes and with an ordinance that requires finely drawn judgments based on the evidence before us. To illustrate, the applicant seeks the use of a particular parcel of land for an educational purpose. The problem immediately raised is that a particular parcel in a particular location might be suitable for certain educational uses under certain conditions and limitations, but not for other uses or for the same uses without conditions and limitations. Moreover, the evidence offered may (and in this case does) raise those questions as to compliance with at least several of the requirements of Section 1204 of the Zoning Ordinance.

We now address the requirements of Section 1204, at least insofar as we deem the state of the record to require comment upon them.

With respect to Section 1204, paragraph 1, sewage disposal and accessibility are the two criteria worthy of comment. As to sewage disposal, a limited permit for installation of an enlarged on-site sewage disposal system has been issued by the Chester County Health Department. That permit effectively limits the number of students who may be enrolled in the school through a limitation on the maximum flow permitted per day. Moreover, the permit, having been issued, satisfies the sewage disposal requirement. On the recommendation of the Planning Commission, a condition was suggested requiring a financial agreement between Peirce and the Easttown Township Municipal Authority to cover sewage capacity for Phase II. We do not

consider such a condition because it presumes Phase II development, a matter not now before us.†

Accessibility is also a concern. Given the location of public transportation and the existent road network, the site is accessible only to a car-commuting student population, and then only at risk of congestion of the roads involved. As to the specific subject of driveway accessibility, further comment will be made below.

The requirements of Section 1204, paragraph 2 and paragraph 4, give us far more concern. Since the application here, the township has adopted a Comprehensive Land Use Plan and some of the requisite enabling ordinances. Were the application to have been filed after their adoption, we would have a different situation; but we must consider the matter given the circumstances at the time of application.

If the proposed educational use to be made of this property is for enrollment of approximately one hundred students in daytime classes at the junior college level, we cannot conclude that such a limited use would substantially injure or detract from the use of the surrounding property or from the character of the neighborhood. Since we understand the Phase I use sought to be thus defined, we need not reach any conclusion at this time as to whether our view would be different were a more extended use intended. We have doubts as to whether the evidence shows a need for the type of use proposed*. The point, however,

† The Planning Commission report also commented on the topographical and related matters with reference to Phase II. These considerations are equally not before us. The remodeling of the manor house and the limited parking lot development requested at this time do not raise topographical or surface water drainage issues of a magnitude to warrant separate comment.

* Viewed in absolute terms, we reject the conclusion of the Planning Commission that data presented by Peirce showed a *need* for a junior college in this area of the Main Line. At most, the evidence indicated that some students might have enrolled at Peirce had it had a suburban location.

is not dispositive, given the limited application under consideration.

The road network issue (see Section 1204, paragraph 3) is another issue not free from doubt. The traffic count information provided by Peirce was not up to date as of the date of the application,** but we will accept the conclusion that adding one hundred round trips to the adjacent roads would be within their probable capacity. We would add, however, that our knowledge of the character of the roads in question would not have permitted us to conclude that any significantly larger number of vehicular trips would have been justified for this property.

There are two dangerous curves on Waterloo Road, the road that gives us greatest concern. The siting of the driveway on this road will have to be at a point and under conditions acceptable to the Pennsylvania Department of Transportation and our Township Engineer to minimize the obvious hazards of these curves.

To conclude, we have decided that a use of the Peirce property for a limited educational purpose as sought, and subject to conditions and requirements that will be imposed in the resolution below, meets the criteria, minimally in some cases of Article XII of the Zoning Ordinance, including Section 1204.

RESOLUTION

WHEREAS, Peirce Junior College has made application under a filing date of February 17, 1972, for conditional use of the tract at Waterloo and Church Roads in Devon, formerly known as the Patterson tract, for specific educational purposes; and

WHEREAS, the Supervisors of Easttown Township have considered the documentary evidence submitted by

** Were we able to reopen the record, this would clearly be a problem today.

various interested parties including Peirce Junior College both to the Planning Commission and to the Supervisors and have also considered the evidence offered at the public hearings conducted by the Planning Commission and the Supervisors on this application, now, therefore, it is

RESOLVED, that the Statement preceding this Resolution is incorporated herein by reference and made a part of this Resolution, and the application of Peirce Junior College is approved subject to the following conditions and requirements (certain of which shall serve to define and limit the conditional educational use being approved):

1. The educational use permitted is limited to junior college classes to be conducted in the daytime only in the manor house on the premises, the total enrollment to be approximately one hundred full time students (in conformity with the traffic count and other information furnished by Peirce in support of the application).

2. Parking facilities shall be installed only in conformity with the plan submitted by Peirce, subject to any necessary relocation in accordance with the driveway location conclusion adopted in conformity with paragraph 6 below. Such facilities shall be screened by evergreen planting of sufficient density, and continuously maintained so as to obscure the cars parked there when viewed from neighboring houses.

3. If lights are installed on the parking lot, they shall not be turned on after 8:00 p.m. and before 7:00 a.m., so as to protect the peace, quiet, privacy and character of the surrounding area.

4. A means satisfactory to the Township Engineer shall be installed and maintained continuously so as to insure and evidence adherence to the 1000 gallons per day maximum flow limitation contained in the Chester County Health Department sewage disposal system permit.

5. If Peirce desires to secure tax exempt status in whole or in part for the property, it shall first enter into an

agreement with Easttown Township providing for an annual payment to Easttown Township in lieu of taxes in the amount of $500.00 (as referred to by Peirce in the record), plus such additional amount as may be demonstrated by the Township through application of generally accepted cost accounting principles to be made necessary on account of any additional fire, police or other safety services required by virtue of the school or its operations.

6. The driveway entrance to the parking lot shall be located in accordance with the directions and approval of the Pennsylvania Department of Transportation, in consultation with the Township Engineer, and shall, if located on Waterloo Road, include such additional work on the road at the vicinity of the entrance as shall allow cars utilizing the entrance from the South to first pull off the operating lane into a driveway entrance lane, and shall otherwise provide line-of-sight improvement alterations as shall be adequate to eliminate the hazards posed by the curves on Waterloo Road, all such approvals to have been obtained and work to have been performed prior to the advent of the use of the premises for classes.

7. Pursuant to Section 1207 of the Zoning Ordinance, no additional or expanded educational use shall be made of the premises except after application for and approval of such application in accordance with the Township's ordinances and regulations as may then pertain.

ADOPTED This 21st Day of January 1974.

J. Wilson

ATTEST:

Secretary

/s/ James L. Larson

/s/ John J. Hucker

Board of Supervisors
Easttown Township

IN RE:
THE APPLICATION OF
PEIRCE JUNIOR COLLEGE

IN THE
COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA
NO. 157 FEBRUARY TERM, 1974
ZONING APPEAL

OPINION

On February 4, 1972, appellant, Peirce Junior College, filed with the governing body of Easttown Township an application for a conditional use to permit use of the premises at 611 Waterloo Road for educational purposes as a college campus.

Hearings were held before the township planning commission and before the Board of Supervisors of the township. Adjoining property owners, petitioners herein, participated in those hearings. On June 5, 1972, the Supervisors declined to take any action on the application.

Following an order of the Court of Common Pleas of this county directing the Supervisors to take action and an Appeal from that Order to the Commonwealth Court of Pennsylvania, which affirmed that Order, the Board of Supervisors on January 21, 1974, approved the application by resolution, imposing seven conditions. No additional testimony was taken at that time, pursuant to the Opinion of the Commonwealth Court. However, offers of proof from petitioners herein were filed. Petitioners proposed introduction of testimony of a traffic expert and real estate expert concerning the effect of the proposed use on the neighboring area.

Within thirty days, petitioners appealed the grant of the use to the Zoning Hearing Board pursuant to Section 1007 of the Pennsylvania Municipalities Planning Code. A hearing thereon was scheduled for April 2, 1974.

Appellant filed an appeal to the Court of Common Pleas challenging the validity of several of the conditions imposed by the Supervisors in granting the use.

Petitioners withdrew their appeal to the Zoning Hearing Board and filed a Petition to Intervene in the zoning appeal of the appellant. It is that Petition to Intervene which is before the Court for determination.

In their petition, they aver:

"7. The determination of this zoning appeal may adversely affect legally recognized interests of the petitioners.

8. Petitioners are permitted to intervene in this appeal pursuant to Section 1009 of the Pennsylvania Municipalities Planning Code, as amended, and pursuant to Pa. R.C.P. 2327(4).

9. If permitted to intervene in this zoning appeal, the petitioners will urge:

(a) That this appeal should be quashed as not being authorized by law because appeals of a landowner from such a decision by the governing body must be taken to the Zoning Hearing Board under the provisions of Section 1006(1)(C) of the Pennsylvania Municipalities Planning Code, as amended, and this Court has no jurisdiction therein. (A copy of said petition is attached.)

(b) If this Court decides to entertain this appeal, that the matter should be remanded by the Court to the Board of Supervisors because adequate opportunity was not provided for petitioners and others similarly situated to present testimony on issues relevant to the determination of the Board and that petitioners' constitutional rights were thereby denied.

(c) If this Court decides to entertain this appeal, that the conditional use permit should be denied on the basis of the existing record, or, if not denied, that the

conditions imposed by the Board of Supervisors should be sustained, particularly in light of the standards established by the Township Comprehensive Plan and its amended zoning ordinances. (A copy of Ord. 117 is attached as Exhibit A.)"

Intervention is governed by Section 1009 of the Municipalities Planning Code. That section provides: "Within the thirty days first following the filing of a zoning appeal, if the appeal is from a board or agency of a municipality, the municipality and any owner or tenant of property directly involved in the action appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Rules of Civil Procedure." Thus it is clear that petitioners' rights, if any, to intervene are governed by the Rules of Civil Procedure. Cf. Patene v. Warwick Twp. Zoning Board of Adjustment, 18 Bucks Co. L. Rep. 583 (1968).

Rules 2326-2350 of the Pennsylvania Rules of Civil Procedure govern intervention. Rule 2327 specifically sets forth those persons who may intervene. Subsections (1) and (2) do not apply to petitioners. Nor does Subsection (3) since the petitioners could not be original parties to this action nor could they be joined. The remaining subsection requires petitioners to have a legally enforceable interest.

Petitioners' legal interests could and should have been enforced in their appeal filed to the Zoning Hearing Board pursuant to Section 1007 of the Municipalities Planning Code. Having withdrawn that appeal, they foreclosed their rights, and have no "legally enforceable interest" in the present challenge by appellant.

Further, Pa. R.C.P. 2329 allows the Court to deny a party the right to intervene under certain circumstances. The prayer of the petition to intervene seeks first, to quash the appeal; second, to remand the matter to the Zoning Hearing Board; and third, to reverse the grant of the conditional use by the Board of Supervisors.

The appeal presently before the Court seeks only to attack the conditions imposed by the Supervisors. If petitioners are permitted to intervene, the issues they raise would relegate the present appeal to a secondary and subordinate matter. This course is proscribed by Pa. R.C.P. 2329(1).

Secondly, the petitioners' interests are protected, on the record, by the Board of Supervisors.

The Pennsylvania Municipalities Planning Code provides a procedure for adjudicating claims for relief by persons allegedly aggrieved by decisions of governing bodies in zoning matters. That procedure is contained in Section 1007 of the Municipalities Planning Code. The claims petitioners aver in their Petition to Intervene could and should have been raised in their appeal.

While petitioners argue that a landowner may elect to proceed directly with an appeal to Court, while adjacent residents must appeal to the Zoning Hearing Board, the intent of the legislature is clearly spelled out and petitioners could have applied for a stay of proceedings so that the Board, in whom the legislature vested the right to consider such matters on appeal, could initially determine the validity of the averments of the petitioners. Having elected not to proceed in that fashion, and in consideration of the foregoing reasons, we enter the following:

ORDER

AND NOW, Aug. 9, 1974, the Rule issued March 20, 1974, to show cause why petitioners should not be allowed to intervene is discharged. The petition is denied.

BY THE COURT:

/s/ JOHN M. WAJERT J.
Common Pleas Court Judge

IN RE: APPLICATION OF
PEIRCE JUNIOR COLLEGE,
Appellee

v.

LLOYD J. SCHUMACKER,
MATTHEW A. and CAROLE A.
BRODERICK, W. H. STERGE
and FRANCES H. O'DELL,
Appellants

In The
Commonwealth Court
of Pennsylvania

No. 1214 Commonwealth
Docket 1974

Before:

HONORABLE JAMES S. BOWMAN, President judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE GLENN E. MENCER, Judge

Argued: February 6, 1975

OPINION BY PRESIDENT JUDGE BOWMAN,

Filed March 11, 1975

This is an appeal from an order of the Court of Common Pleas of Chester County denying appellants the right to intervene in a zoning appeal. Appellants (hereinafter referred to as "neighbors") are residents and owners of land adjacent to or near land owned by appellee Peirce Junior College (Peirce).

In 1969, Peirce, a Pennsylvania nonprofit educational institution with its principal office located in Philadelphia, purchased approximately 75 acres of land in Easttown Township for the purpose of establishing a junior college campus. The land in question is located partially in an A.A. Zone and partially in an A.A.A. Zone. Under the Township Zoning Ordinance, educational uses are permitted in both these residential zones as a conditional use.

Peirce filed an application for a conditional use to permit use of the land for educational purposes as a college campus. Hearings were held before the Township Planning Commission and before the Township's Board of Supervisors in which the neighbors participated. The Supervisors declined to take any action on Peirce's application. Peirce then brought a mandamus action seeking to compel the Supervisors to act. The lower court so ordered and on December 19, 1973, that order was affirmed by this Court in *Larson v. Peirce Junior College*, 11 Pa. Commonwealth Ct. 271, 314 A.2d 572 (1973). In accordance with this Court's order in *Larson*, requiring the Township to approve or disapprove the application within 45 days, the Board of Supervisors acted on Peirce's application and granted the conditional use, imposing several conditions.

Two appeals were filed from this action of the Supervisors. Peirce appealed to the Court of Common Pleas challenging the validity of several of the conditions imposed by the Supervisors in granting the use; the neighbors, seeking to reverse the grant of the use,

appealed to the Zoning Hearing Board. Prior to the scheduled hearing in the neighbors' appeal to the Zoning Hearing Board, the neighbors withdrew their appeal to the Board and filed a petition to intervene in Peirce's appeal to the court below.

In their petition to intervene, the neighbors averred, *inter alia:*

> "7. The determination of this zoning appeal may adversely affect legally recognized interests of the petitioners.
>
> "8. Petitioners are permitted to intervene in this appeal pursuant to Section 1009 of the Pennsylvania Municipalities Planning Code, as amended, and pursuant to Pa. R. C. P. 2327 (4).
>
> "9. If permitted to intervene in this zoning appeal, the petitioners will urge:
>
> (a) That this appeal should be quashed as not being authorized by law because appeals of a landowner from such a decision by the governing body must be taken to the Zoning Hearing Board under the provisions of Section 1006(1)(C) of the Pennsylvania Municipalities Planning Code, as amended, and this Court has no jurisdiction therein.[1] (A copy of said petition is attached.)
>
> (b) If this Court decides to entertain this appeal, that the matter should be remanded by the Court to the Board of Supervisors because adequate opportunity was not provided for petitioners and others similarly situated to present testimony on issues relevant to the determination of the Board and that petitioners' constitutional rights were thereby denied.

1. There may be some merit to the neighbors' contention that the lower court is without jurisdiction in Peirce's appeal, and that jurisdiction would properly lie with the Zoning Hearing Board. This issue is not properly before this Court nor has it been properly presented to or decided by the lower court as yet, and, therefore, we will not discuss it further.

> (c) If this Court decides to entertain this appeal, that the conditional use permit should be denied on the basis of the existing record, or, if not denied, that the conditions imposed by the Board of Supervisors should be sustained, particularly in light of the standards established by the Township Comprehensive Plan and its amended zoning ordinances."

The court below denied the petition to intervene in a decision rendered on August 9, 1974. The sole issue presented in the instant appeal is whether or not the lower court committed an error of law or manifestly abused its discretion in dismissing the neighbors' petition to intervene.

Intervention is governed by Section 1009 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P. L. 805 *added* June 1, 1972, P. L. — (Act No. 93), 53 P. S. §11009 . That section provides:

> "Within the thirty days first following the filing of a zoning appeal, if the appeal is from a board or agency of a municipality, the municipality and any owner or tenant of property directly involved in the action appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Rules of Civil Procedure."

The neighbors, not being the owners or tenants of the property *directly* involved in the action, must therefore proceed under the Pennsylvania Rules of Civil Procedure.

Pa. R. C. P. No. 2327 determines who may intervene. The neighbors contend that they fall under paragraph (4) of that Rule which provides:

> "At any time during the pendancy of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

". . .

"(4) the determination of such an action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action."

We need not determine whether a "legally enforceable interest" exists in the context of the appeal presently before the lower court since we hold that the court below did not abuse its discretion in refusing the neighbors' application under Pa. R. C. P. No. 2329. Pa. R. C. P. No. 2329 permits a court to use its discretion and refuse an application for intervention if:

". . .

"(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

"(2) the interest of the petitioner is already adequately represented; . . . ."

As stated in paragraph 9 of the neighbors' petition quoted above, the neighbors first seek to quash the appeal. This is clearly not in subordination to nor in recognition of the propriety of the appeal. They next seek a "remand" to the Zoning Hearing Board. This issue also tends to relegate Peirce's appeal to a secondary and subordinate position.

The neighbors' last prayer for relief actually seeks two remedies: (1) that the conditional use be denied, or (2) that the conditions attached by the Supervisors be upheld. The first is insufficient to justify intervention for the same reasons stated above; the second might be a proper basis for intervention if the interest of the neighbors in upholding the conditions was not adequately represented. *See Esso Standard Oil Co. v. Taylor*, 399 Pa. 324, 159 A.2d 692 (1960). The court below found, however, that this interest of the neighbors was already adequately represented by the Board of Supervisors. Absent any

evidence to the contrary, we will not interfere with the exercise of the lower court's discretion.

The neighbors had the right to appeal to the Zoning Hearing Board in accordance with Section 1007 of the Pennsylvania Municipalities Planning Code, 53 P. S. §11007. The claims they tried to raise in Peirce's appeal should have been pursued before the Zoning Hearing Board.

Affirmed.

/S/ JAMES S. BOWMAN, J.
President Judge, Commonwealth Court

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia, 19107
July 11, 1975

Donald W. Kramer, Esq.
20th Floor, Three Parkway
Philadelphia, Pa. 19102

In Re: Application of Peirce Junior College v. Lloyd J. Schumacker, et al., Petitioners No. 1881 Allocatur Docket

---

Dear Mr. Kramer:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal in the above captioned matter:

"July 9, 1975

Petition denied.

Per Curiam"

Very truly yours,

LAURA E. LITCHARD
Deputy Prothonotary

LEL:ejh

cc: Thomas A. Riley, Jr., Esq.

Supreme Court, U. S.
FILED
NOV 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-533.

LLOYD J. SCHUMACKER, et al.,
Petitioners,

v.

PEIRCE JUNIOR COLLEGE,
Respondent.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANKLIN H. SPITZER,
WOLF, BLOCK, SCHORR & SOLIS-COHEN,
12th Floor, Packard Building,
Philadelphia, Pa. 19102
Attorneys for Respondent.

Dated: November 6, 1975

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether the refusal to permit owners of land situated in the neighborhood of a tract of land, which tract is the subject of an appeal by its owner from a conditioned grant of a zoning permit, to intervene in that zoning appeal where said neighboring landowners seek to introduce into that appeal proceeding the issues raised by them as appellants in their separate appeal from the grant of said permit (which appeal said neighbors had voluntarily withdrawn with prejudice) and where the municipality, in which said tracts are situated, is defending the landowners appeal as appellee, is a denial of the right to intervene a violation of the Due Process Clause of the Fourteenth Amendment?

COUNTER-STATEMENT OF CASE.

In April, 1969, Respondent, Peirce Junior College ("Peirce"), purchased seventy-five (75) acres of ground in Easttown Township, Chester County, Pennsylvania. The Peirce property is situated in the AA and A Residential Zoning Districts of Easttown Township, which permit single-family residential use on two and one acre lots respectively and also permit educational uses when permitted by the Board of Supervisors of the Township as a conditional use. The Petitioners' properties are situated in the vicinity of the Peirce tract in this rural-suburban area of Easttown Township.

On February 4, 1972, Peirce filed an application with Easttown Township for a conditional use permit to use its property for a junior college. Pursuant to the provisions of the Easttown Township Zoning Ordinance, a hearing was held before the Planning Commission of Easttown Township at which Peirce presented evidence relating to its proposed use in compliance with standards set forth in the Zoning Ordinance. The Petitioners were present or represented at that hearing but did not present any evidence or witnesses contrary to Peirce's position. Thereafter, the Board of Supervisors of Easttown Township held hearings on the Peirce Application on May 18 and June 2, 1972, at which Peirce again presented its witnesses and evidence with respect to its proposed use. The Petitioners were again present and represented at the hearings before the Board of Supervisors and again failed to present evidence in opposition to Peirce's proposed use. The Board of Supervisors adjourned the hearings on June 2, 1972 and resolved to remand the matter to the Township's Planning Commission. Peirce then proceeded, in the Court of Common Pleas of Chester County, Pennsylvania, to obtain a Writ of Mandamus ordering the Board of Supervisors to

render a decision on the Peirce Application. Thereafter, pursuant to the Writ, at a regular meeting on January 21, 1974, the Board of Supervisors passed a Resolution granting the conditional use subject to a number of restrictive conditions. The Petitioners appeared at that Township meeting and requested allowance to present additional evidence on the Peirce Appeal. This request was denied by the Board of Supervisors, the hearings having been adjourned eighteen months prior to said time, but did accept into the record an offer of proof presented by the Petitioners with respect to their proposed evidence.

Both the Petitioners and the Respondent appealed the decision of the Board of Supervisors of Easttown Township. Pursuant to Section 1007 of the *Pennsylvania Municipalities Planning Code,* Act of January 1, 1969, P. L. 805, as amended, 53 P. S. 11007, the Petitioners appealed the Board of Supervisors' decision to the Zoning Hearing Board of Easttown Township. In their appeal, the Petitioners sought a hearing at which to present additional evidence with respect to Peirce's Application and additionally sought reversal of the grant of the proposed use. The Zoning Hearing Board of Easttown Township advertised an evidentiary hearing on the Petitioners' appeal for April 2, 1974, at which time Petitioners would be permitted to present the additional evidence which they desired. However, on March 29, 1974, the Petitioners suddenly and voluntarily withdrew, with prejudice, their appeal to the Zoning Hearing Board and cancelled the evidentiary hearing.

Concurrent with the Petitioners' appeal to the Zoning Hearing Board of Easttown Township, Peirce, pursuant to Section 1006 of the Pennsylvania Municipalities Planning Code, 53 P. S. 11006, appealed the imposition of the conditions upon the grant of the conditional use to the Court of Common Pleas of Chester County. Easttown Town-

ship has appeared and actively participated as Appellee in said appeal.

In mid-March, 1974, Petitioners petitioned the Court of Common Pleas of Chester County for leave to intervene as Appellees in Peirce's appeal. In their Petition to Intervene, the Petitioners set forth three (3) courses of conduct which they intended to pursue if permitted to intervene: (a) they would seek to quash the appeal, alleging that Section 1006 of the Pennsylvania Municipalities Planning Code required Peirce's appeal to be taken to the Zoning Hearing Board; (b) they would seek to have the matter remanded to the Board of Supervisors for resumption of the evidentiary hearing to present additional testimony; and, (c) they would seek the reversal of the grant of the conditional use based upon the present record or, in the event that such reversal is denied, the sustaining of the conditions. Subsequent to the filing of the Petition to Intervene and prior to any answer or action thereon, Petitioners withdrew their appeal to the Zoning Hearing Board, as mentioned above, and cancelled the evidentiary hearing before the Zoning Hearing Board of Easttown Township, at which time they could have presented the evidence which they now seek [a remand] to present to the Board of Supervisors.

Pursuant to the Pennsylvania Municipalities Planning Code, intervention in zoning appeals by persons other than the owner of the ground subject to the appeal is governed by the Pennsylvania Rules of Civil Procedure. *Pennsylvania Rule of Civil Procedure* 2329, *42 Pa. C. S. A.* 2329 (1975), provides that intervention may be denied, inter alia, (a) if the claim or defense of the Petitioner is not in subordination to or in recognition of the propriety of the action in which intervention is sought, or (b) if the interest of the petitioner for intervention is already adequately represented in said action. Peirce in its answer to the Petitioners' Petition to Intervene alleged that the courses of conduct which Petitioner asserted it would follow if permitted to intervene would not be in subordination to or in recognition of the propriety of the existing appeal of Peirce but would instead enable the Petitioners, by intervening as appellees, to become appellants and advance, as such, the issues which Petitioners had sought to raise in their appeal to the Zoning Hearing Board. After argument, the Court of Common Pleas of Chester County denied the Petitioners' Petition to Intervene on the grounds that the issues Petitioners sought to raise were not subordinate to or in recognition of the propriety of the present pending appeal of Peirce and that the interest of the Petitioners as residents of the Township with respect to the enforcement of the Zoning Ordinance of the Township, were adequately represented by the appearance of the Township Solicitor in defense of the Board of Supervisors.

Petitioners then appealed the denial of their intervention to the Commonwealth Court of Pennsylvania, which after argument, affirmed the decision of the Court of Common Pleas of Chester County. The Commonwealth Court, in light of the issues Petitioners sought to raise, refused to disturb the discretionary judgment of the Court of Common Pleas with respect to the denial of intervention pursuant to Pennsylvania Rule of Civil Procedure 2329. It should be noted that both the Court of Common Pleas and the Commonwealth Court recognized that if the Petitioners had merely sought to defend the conditions imposed by the Board of Supervisors, intervention would have undoubtedly been granted. However, at argument before both courts, Petitioners strenuously reasserted their intention to seek both a remand for the purpose of holding further evidentiary hearings and the ultimate denial of the conditional use requested by Peirce.

Subsequent to the affirmance of the lower court decision by the Commonwealth Court of Pennsylvania, Petitioners petitioned for allowance of appeal to the Supreme Court of Pennsylvania. Said petition for allowance of appeal was denied by the Supreme Court of Pennsylvania, per curiam.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I. The Petitioners Have Not Properly Exhausted the Remedies Provided by the Laws of the Commonwealth of Pennsylvania and Therefore Certiorari Should Be Denied.

Where a petitioner alleges that state procedure has deprived him of due process of law without adequate opportunity for a hearing, the petitioner must have properly invoked existing state remedies before certiorari will lie to determine whether state procedures have denied the petitioner due process. *Phyle v. Duffy*, 334 U. S. 431 (1948), reh. denied, 334 U. S. 862. "The fact that (Petitioner's) opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied." *American Surety Company v. Baldwin*, 287 U. S. 156, 162 (1932).

The law of Pennsylvania has provided a procedure whereby a neighboring landowner who believes himself aggrieved by the decision of the municipality pursuant to the municipality's zoning ordinance may appeal that decision to the zoning hearing board, a local judicial tribunal whose decisions may be appealed to the Court of Common Pleas. The Petitioners in this case elected to appeal to the Zoning Hearing Board from the decision of the Board of Supervisors on Peirce's application. A hearing was set on their appeal for April 2, 1974, at which hearing the Board, pursuant to the *Pennsylvania Municipalities Planning Code*, Section 1005, 53 P. S. 11005, would have been required to hear Petitioners' evidence. The *Pennsyl-*

vania Municipalities Planning Code, in Section 908, 53 P. S. Section 10908, governing hearings to be held by the Zoning Hearing Board, specifically provides that all parties shall be afforded the opportunity to present evidence on all relevant issues. In essence, the Commonwealth of Pennsylvania has provided a procedure in which citizens who wish to assert positions such as those advanced by the Petitioners in this matter, may obtain a forum to present such evidence as they desire, together with a right of judicial appeal therefrom. In short, the Petitioners have intentionally determined not to follow the procedure created by the Commonwealth of Pennsylvania for the adjudication of their claims.

Instead, the Petitioners have sought to advance their positions by attempting to intervene in a proceeding provided by the state for the determination of the issues raised by Peirce. The Petitioners appear to argue that since the Peirce proceeding is advancing at a higher judicial level than the appeal of the Petitioners, the Petitioners appeal will be precluded from full and proper consideration by reason of prior determination of the Peirce appeal. However, the Petitioners fail to explain why the prior determination of the Peirce appeal will be prejudicial to the questions raised in Petitioners appeal. Clearly, there is a lack of identity with respect to the parties in the appeals; and there is also likely to be a lack of identity with respect to the issues raised therein. In addition, the Pennsylvania Municipalities Planning Code has provided procedures which will rapidly advance the Petitioners' appeal to the Court of Common Pleas, thereupon to be consolidated with the Peirce appeal, assuming the issues then in question are proper for consolidation.

If the Petitioners had pursued the procedures provided them by the law of Pennsylvania, and could thereafter factually substantiate their claim that having done so they were denied a full and adequate hearing, this Court could then consider the issuance of a Writ of Certiorari for the purpose of reviewing the adequacy of the state procedures in light of constitutional requirements. However, Petitioners ill-founded, unsubstantiated assertions cannot and should not provide a basis for the review of state procedures on the grounds that they violate constitutional mandates. See *Phyle v. Duffy,* 334 U. S. 431 (1948).

In addition, it should be noted that the Petitioners present inability to reinstate the proper state procedure does not constitute an exhaustion of state remedies upon which a Petition for Writ of Certiorari can be based. In *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932), the Appellant, through misapprehension of state procedures sought relief by filing a motion to vacate the judgment entered against it rather than by appealing the judgment. By the time the impropriety of proceeding by motion to vacate had been judicially determined, it was too late to rectify the error of failing to take an appeal. This Court held that the failure to be able to rectify the error and follow the prescribed procedure did not furnish a basis for a claim in federal court that due process law had been denied. The present Petitioners *voluntarily* withdrew their use of the mandated state procedure, with prejudice. Clearly, the holding of *American Surety Co. v. Baldwin* precludes federal jurisdiction in such instances.

II. The Petitioners Do Not Have "Property Interests" Which Fall Within the Realm of Procedural Due Process Protection.

In the proceeding pending before the court of Common Pleas of Chester County, Pennsylvania, Respondents have challenged the validity of conditions attached by the

Board of Supervisors of Easttown Township to a conditional use permit granted by the Township upon an application filed pursuant to the Township's zoning ordinance. The position of Petitioners herein is that to permit judicial consideration of the validity of the conditions attached to the Respondent's use permit without granting the Petitioners an opportunity to participate in the hearing thereon deprives them of certain "property rights" without due process of law. Petitioners allege that their real estate within the municipality will decline in value, and noise and traffic in the vicinity of the site will increase, if the conditions imposed by the Township on the proposed use are invalidated.

In their Brief, the Petitioners strenuously argue that "property interest" cannot be denied without an opportunity for full hearing. In support thereof, they cite many cases, all dealing with specific, tangible, *individual* property. But the right to operate an automobile, the right to use one's own leasehold, the right to maintain one's own structure, the right to sell one's own premises, and the right to sell one's own skills and talents are all rights directly related to property independently acquired and held by private persons. They are not analogous to the Petitioners claim of a private, independently enforceable, amorphous interest in the real property of others.

While the police power may be used to subvert the property rights of individuals to the public welfare, it may not be used to subvert inherent property rights of individuals to the benefit of other private individuals. See *Federal Housing Administration v. Darlington, Inc.*, 358 U. S. 84 (1958) reh. denied, 358 U. S. 937 (1959). The police power lies with the governmental body and is enforceable thereby. Undisputably, Easttown Township has unhaltingly pursued the enforcement and validity of its use of the police power.

Petitioners cite the case of *Wilkinson v. Leland*, 2 Pet. 627, 657 (1829) for the proposition that "the right of citizens to free enjoyment of their property lawfully acquired" is a fundamental principal of republican government. However, it is this very principal of which the Petitioners, themselves, lose sight. The Zoning Ordinance of Easttown Township is being used to regulate and restrict the right of Peirce to freely use and enjoy its property for educational purposes. For half a century, this court has recognized the power of the states, and their municipalities to restrict and regulate such uses for the *public* welfare, provided such regulation is a legitimate assumption of the police power. *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). In compliance with the constitutional requirements of due process, the Commonwealth of Pennsylvania has provided the proceeding pending below to enable Peirce to receive a full hearing on the deprivation of its property rights resulting from the enforcement of the zoning regulations as administered by the Township against the Peirce tract.

The Petitioners have, without legal support or argument, unwarrantedly assumed that the legislative determination that the application of the Zoning Ordinance to the Peirce tract as interpreted by the Municipality, has created individual property rights in each petitioner to maintain whatever benefits they may experience as a result of the Municipality's action. It is inconceivable that Easttown Township could validly restrict the use of the Peirce tract for the purpose of creating an enforceable right in each of the Petitioners to maintain the present market values of their properties? Clearly, the local legislative body in its wisdom could rezone the Petitioners neighborhood in a manner which would increase noise and traffic in their area while also decreasing market values. Finally, a novel and unreasonable proposition

results from the extension of the Petitioners' assumption; namely that each and every beneficiary of a federal state, or local statute or ordinance, whether or not his benefit which was intended or even envisioned by the legislative body, obtains from the existence of such benefit a property right therein which gives rise to procedural due process protection in the form of a full opportunity to be heard in every proceeding in which the statute or ordinance, or any portion or interpretation thereof, is in question.

The cornerstone of the Petitioners request for relief is their assumption that they have acquired enforceable property interests as a result of the municipality's actions administering its zoning ordinance with respect to a tract of land in which they admittedly have no property interest. Since this assumption is clearly without merit, foundation, reason or justification, Petitioners' argument for relief must fall with its foundation.

III. The Extent to Which Intervention Is Constitutionally Compelled Is Clear.

In the same manner in which they have constructed their initial argument, Petitioners have cornerstoned the argument that intervention may be constitutionally compelled on a fictional assumption. That assumption is that there is constitutionally guaranteed right of intervention, the very conclusion their argument seeks to reach.

This Court clearly stated in *Dohany v. Rogers*, 281 U. S. 362, 369: "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure." The requirements of due process are reasonable notice and a reasonable opportunity to be heard. *Goldberg v. Kelly*, 397 U. S. 254 (1970). That the reasonable right to be heard is in a forum different than the one Petitioners would desire it to be, does not give rise to a claim of denial of due process.

Thus, even if, arguendo, the Petitioners do possess some important property interest of which they may be deprived by the Respondent's use of their tract as proposed, unfettered by the conditions imposed by the Township, the failure to permit the Petitioners to obtain a hearing on their claims or defenses in the present proceeding pending before the Common Pleas Court of Chester County does not deny the Petitioners due process. The Commonwealth of Pennsylvania has provided at least two other forums and proceedings in which the Petitioners claims and defenses may receive a full hearing in adjudication.

First, as noted in Argument I above, the Petitioners claims and defenses may be presented, as framed by them, before the Zoning Hearing Board of Easttown Township. Statutory provisions provide for both full and adequate hearings therein and for judicial appeal therefrom. However, Petitioners have voluntarily withdrawn from the pursuit of this process.

In addition, the claims and defenses of Petitioners may also be heard in an action brought by them to enjoin Respondent's use of their tract as a private nuisance. Judicial sanction of the Respondent's use, vis-a-vis the Township's Zoning Ordinance, would not preclude the protestant's prosecution of such an action. Nor would the delay of a hearing on the Petitioners' claims and defenses until after the Respondent's actions have commenced create a denial of due process. *Bowles v. Willingham*, 321 U. S. 503 (1944).

The Petitioners' reliance on Rule 24 of the Federal Rules of Civil Procedure is misplaced. Although the Petitioners would assert that it is not clear whether Rule 24, which governs intervention in Federal Courts, is a statement of constitutional principals, it is clear that the constitution does not require the states to establish judicial procedures which are parallel, or even consistent, with the

Federal Procedure. The requirement is that state judicial procedures be adequate to comport with the due process requirements of the constitution. *United Gas Public Service Co. v. State of Texas*, 303 U. S. 123 (1938).

It is clear that the Commonwealth of Pennsylvania has provided at least two adequate methods to safeguard any rights which the Petitioners may have with respect to the Respondent's proposed or actual use of its land. The fact that Petitioners may have been able to proceed in a different fashion in Federal Court is of no moment.

CONCLUSION.

The questions which Petitioners purport to raise in their brief arise, if at all, from (1) the Petitioners' voluntary decisions neither to avail themselves of the present procedures provided by the Commonwealth of Pennsylvania nor to permit future courses of action to ripen; and, (2) the numerous fictitious assumptions by the Petitioners in the creation of their arguments. The writ sought by Petitioners is not supported by law or fact, and Respondent's respectfully urge this Court to deny the issuance of a Writ.

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